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Nos. 88-449, 88-513

IN THE

United States Supreme Court

OCTOBER TERM, 1988

JOHN F. HEALY, *et al.*,

Appellants,

v.

THE BEER INSTITUTE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000
Attorneys for Appellee
Anheuser-Busch, Inc.

Of Counsel
Timothy G. Reynolds
Janet E. Schomer

GARY NATEMAN, ESQ.
The Beer Institute
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337
Attorney for Appellee
The Beer Institute

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Appellee
Miller Brewing Company

Of Counsel
Wayne C. Holcombe

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Appellees
The Beer Institute,
G. Heileman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company, Inc.,
Monterey Bay Company, Inc., and
Van Munching and Company, Inc.

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Connecticut beer price affirmation law has the practical effect of regulating brewers' out-of-state prices in violation of the Commerce Clause.

2. Whether the decision of the court of appeals should be affirmed because the Connecticut beer price affirmation law constitutes economic protectionism in violation of the Commerce Clause by purposefully neutralizing the competitive advantages possessed by businesses and consumers in States bordering Connecticut.

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

This case involves the State of Connecticut's latest attempt to devise a beer price affirmation scheme that can withstand scrutiny under the Commerce Clause of the United States Constitution. Appellees, plaintiffs below, are a brewers' trade association and individual brewers and importers of beer injured by the Connecticut beer price affirmation law (the "brewers").[1] Appellants, defendants below, are the Connect-

[1] The listing required by Supreme Court Rule 28.1, naming all parent companies, non-wholly-owned subsidiaries and affiliates of appellees, is contained in the Appendix to appellees' Motion for Summary Affirmance, previously filed in this Court. The present members of The Beer Institute are: Anheuser-Busch, Inc.; G. Heileman Brewing Company; Latrobe Brewing Company; Miller Brewing Company; and the Stroh Brewing Company. Pabst Brewing Company is no longer a member of The Beer Institute.

icut officials responsible for enforcing the statute ("Connecticut") and an intervenor liquor wholesalers' trade association.

The Connecticut law at issue here and its predecessor, which was declared unconstitutional in *United States Brewers Ass'n, Inc. v. Healy*, 464 U.S. 909 (1983), *aff'g per curiam*, 692 F.2d 275 (2d Cir. 1982), *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) ("*Healy I*"), were both adopted to deal with the same problem. Even though brewers' prices to Connecticut wholesalers were not the highest in the four-state area, the retail price of beer has historically been higher in Connecticut than in the bordering States of Massachusetts, New York and Rhode Island. *Healy I*, 532 F. Supp. at 1320; Conn. Br. 6; Wholesalers Br. 8. As a result, Connecticut residents living in border areas have crossed state lines to purchase beer in other States at lower prices. Since 1981, the Connecticut legislature has sought to eliminate the price advantage available in bordering States by a combination of price posting (requiring brewers to state their prices during a future period in Connecticut) and price affirmation (linking the maximum brewer price in Connecticut to the brewer's minimum price for the same item anywhere in any bordering State). Both the original Connecticut statute and the current statute have the same purpose — to eliminate the availability of beer at lower prices in the bordering States — and the same practical effect — to control the brewers' pricing decisions in those States.

Connecticut law requires brewers to post prices on the sixth of each month to take effect on the first of the following month, and further requires that all sales during the month be at the posted prices then in effect. In addition, under the first version of the price affirmation law, brewers were required to affirm at the time of posting that their posted prices were no higher than the lowest prices they would charge during the effective period for comparably packaged items in States bordering Connecticut. This Court declared Connecticut's first beer price affirmation law unconstitutional in *Healy I*. In the opinion accompanying the judgment that the Court summarily affirmed, the Second Circuit noted that the law had the

practical effect of controlling for each future month the prices that brewers could charge to wholesalers in other States. For that reason the statute was at odds with "well-established Commerce Clause principles [that] prohibit the state from controlling the prices set for sales occurring wholly outside its territory." 692 F.2d at 282.

In 1984, the Connecticut legislature adopted certain technical amendments to the beer price affirmation law purporting to correct the constitutional deficiencies found in *Healy I*. The amendments were flawed. On its face the amended law still expressly prohibited the brewers from charging prices in Connecticut that were higher than their lowest prices in the bordering States during the effective period of any posting. Finally, after the present suit was filed, Connecticut submitted in the form of an affidavit a "Declaratory Ruling" of the Connecticut Department of Liquor Control purporting to eliminate the express prohibition on reducing out-of-state prices after posting in Connecticut. Under this Ruling, the brewers are now required to affirm that, contemporaneously with the time of posting, their posted prices (for the following month) are no higher than their current lowest prices for comparably packaged items in any of the bordering States. Even as modified by the Declaratory Ruling, Connecticut's price affirmation law still impermissibly restricts the brewers' freedom to set prices for their products in other States based on competitive or marketing conditions in those States.

The facts relevant to this appeal were not disputed in the district court.

A. Beer Marketing in Connecticut and Surrounding States

The beer industry in Connecticut and its three bordering States has three marketing levels: brewers and importers of beer, wholesalers, and retailers. Some brewers market national brands, such as Budweiser and Miller High Life. Others market regional or local brands, and sometimes confine the sales thereof to limited portions of the four-state area. Brewers and importers ship all beer into Connecticut; no breweries

are located in that State. *United States Brewers Ass'n v. Healy*, 669 F. Supp. 543, 545-46 (D. Conn. 1987), J.A. 165A, 167A-168A, *rev'd sub nom. In re Beer Institute*, 849 F.2d 753 (2d Cir. 1988) (*"Healy II"*), J.A. 189A.[2] Connecticut wholesalers and retailers, on the other hand, are typically local Connecticut enterprises.

Each of these marketing levels is highly regulated in Connecticut. Wholesalers have exclusive territories, *i.e.*, a retailer may purchase each brand of beer from only one designated Connecticut wholesaler. *See* Conn. Dep't Liquor Control Reg. 30-6-B7. A wholesaler must charge each of its retail customers the same price for each product regardless of volume sold and regardless of the competitive conditions confronted by the wholesaler. Conn. Gen. Stat. Ann. § 30-63(b) (West Supp. 1988). Brewers can sell beer to wholesalers only at a uniform statewide price posted with the liquor commission on the sixth day of the preceding month, and they cannot change that price until the posted price for the next month takes effect. *Id.* § 30-63(c). Connecticut law also prohibits brewers from offering price discounts, requires any price change to remain in effect for at least one month and requires uniform prices to all wholesalers throughout Connecticut. *Id.* §§ 30-63(b)-(c).

Contrary to the assertion of the Wholesalers, Br. 9, beer sales are less stringently regulated in the States bordering Connecticut. For example, each of the bordering States allows brewers to offer price discounts and other inducements to wholesalers. *Healy I*, 532 F. Supp. at 1319 & n.29. In addition, both New York and Rhode Island allow brewers to charge different prices to wholesalers depending on volume sold and other competitive conditions. *Id.* at 1319. Moreover, New York, unlike Connecticut, does not require that wholesalers be given exclusive territories. Rule 9(c) Statement of

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[2] Citations to "J.A. _____" are to the Joint Appendix filed with this Court in connection with this appeal.

Plaintiffs In Support of Their Cross-Motion for Summary Judgment 4, J.A. 140A.[3]

As acknowledged by appellants, Connecticut retailers, particularly near the border, suffer in their competition with bordering-state retailers, because retail beer prices are generally higher in Connecticut than in the bordering States. *Id.* at 6, J.A. 141A. "Connecticut residents have crossed state borders in significant numbers to purchase beer in other States at lower retail prices." Conn. Br. 6-7; Wholesalers Br. 9; *see also Healy I*, 532 F. Supp. at 1320, 692 F.2d at 276; *Healy II*, 669 F. Supp. at 546, J.A. 169A.

B. Price Affirmation

Appellants concede that the purpose of the beer price affirmation statute was to increase the purchase of beer by Connecticut residents within the State by eliminating lower beer prices in neighboring States. Conn. Br. 6-7, 19, 23; *see also Healy I*, 692 F.2d at 276; *Healy II*, 849 F.2d at 755, J.A. 192A.

1. *The 1981 Act*

Connecticut first enacted beer price affirmation in 1981 to protect its local retailers and wholesalers from out-of-state competition. Wholesalers Br. 14, 32-35. The 1981 amendment to the Connecticut liquor pricing statute prohibited brewers from selling beer in Connecticut at a price higher than the lowest price "at which such item is then being sold" in any neighboring State. Conn. Gen. Stat. Ann. § 30-63a(b) (West Supp. 1981). In addition, the 1981 amendment required brewers, at the time of posting, to file a written affirmation under oath that the posted price of beer to wholesalers in Connecticut would be no higher than the lowest price at which comparably packaged beer "is or will be" sold to wholesalers in any State bordering Connecticut during the month covered by the posting. *Id.*, former § 30-63b(b). In calculating the lowest out-of-state price during the period of posting, all

[3] Facts cited herein from Plaintiffs' Rule 9(c) Statement were not disputed by appellants.

discounts, rebates and allowances offered in the neighboring States had to be included. *Id.*, former § 30-63c(b). The only price differentials allowed were differences in state taxes and actual delivery costs. *Id.*

2. *Healy I*

Certain of the current plaintiffs-appellees filed suit in United States District Court for the District of Connecticut challenging the 1981 statute as unconstitutional under the Commerce Clause. The brewers contended, *inter alia*, that the statute was invalid because of its extraterritorial effects, because it was intended and operated as "simple economic protectionism" and because any possible intrastate benefits were outweighed by the harm to interstate commerce. Relying primarily on *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the district court upheld the statute. *See Healy I*, 532 F. Supp. 1312 (D. Conn. 1982).

On appeal, the Second Circuit reversed. *See Healy I*, 692 F.2d 275 (2d Cir. 1982). The court of appeals found the Connecticut statute unconstitutional on its face because the statute had the practical effect of prohibiting a brewer from selling beer in any neighboring State at a price below what it had previously posted in Connecticut. As the court explained:

> Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

Id. at 282. This Court summarily affirmed. 464 U.S. 909 (1983).

3. *Amendments Following Healy I*

In response to *Healy I*, in 1984 the Connecticut legislature amended its beer price affirmation statute to its current form. The stated purpose of the legislature was to correct the deficiencies found in *Healy I*. Conn. Br. 18; *see Healy II*, J.A. 193A. The underlying purpose of fostering Connecticut

wholesale and retail businesses at the expense of bordering-State businesses and consumers remained the same.[4] As Connecticut later recognized, however, the 1984 amendments left the key provision, Section 30-63a(b), unchanged, so that by its express terms the amended statute had the same effect as the prior law of directly controlling future prices in the bordering States. *See* Conn. Br. 7 n.2; Brief on Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Stay 5-6, J.A. 90A-91A.

After the 1984 amendments, the Connecticut price affirmation law stood as follows: Section 30-63a(b) continued to make it illegal for brewers to sell beer in Connecticut at a price higher than the price at which beer is or will be sold in any bordering State during the month covered by the posting. Section 30-63b(b) had been changed; it now required brewers to affirm that the prices they were posting were no higher than prices in other States at the time of the Connecticut posting. Section 30-63b(e) provided that "[t]his section" — *i.e.*, section 30-63b — did not prohibit brewers from changing their out-of-state prices. This provision did not, however, mention section 30-63a(b), which clearly prohibited brewers from reducing bordering-state prices below the prices they had affirmed and posted in Connecticut.

C. Procedural History of the Current Litigation

The brewers again filed suit in the United States District Court for the District of Connecticut seeking a declaration that the revised Connecticut statutory scheme was unconstitutional and requesting an injunction against its enforcement. The complaint alleged that the Connecticut beer price affirmation statute regulated out-of-state transactions, constituted

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[4] *See also* Defendants' Memorandum In Opposition at 11, J.A. at 149A: "Since the 'new' provisions are simply 'technical amendments' admittedly aimed only at correcting the constitutional infirmity perceived by the Court of Appeals, then such amendments cannot be viewed as substantially altering the purpose of the Act in general."

economic protectionism, and unduly burdened interstate commerce, all in violation of the Commerce Clause.[5]

Connecticut answered and filed a motion for summary judgment asserting that the revised Connecticut statute was valid under *Healy I*. The only evidentiary material submitted with the summary judgment motion was a "Declaratory Ruling" by the Department of Liquor Control, in the form of an affidavit of defendant liquor commissioners John F. Healy and David L. Snyder. J.A. 29A-30A. The declaratory ruling interpreted the 1984 amendments to the price affirmation statute as requiring brewers to affirm that at the time of posting — on the sixth of the month — their posted prices in Connecticut were no higher than their lowest prices in any neighboring State. According to the ruling, it would not violate Connecticut law for a brewer subsequently to lower bordering-state prices below the previously affirmed Connecticut price. However, as appellants acknowledge, brewers cannot in fact subsequently lower bordering-state prices due to the interaction of the Connecticut affirmation law with the laws of the bordering States.

The brewers opposed Connecticut's summary judgment motion and filed a cross-motion for summary judgment. They argued that the Connecticut price affirmation statute, even as amended and as further altered by the Liquor Commission's declaratory ruling, violated the Commerce Clause on its face.[6]

The district court granted appellants' motion for summary judgment and denied appellees' cross-motion for summary judgment on the basis of *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The Second Circuit, relying upon *Brown-Forman Distillers Corp. v. New York*

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[5] A fourth count of the complaint asserted that the Connecticut scheme violated the Supremacy Clause of the Constitution because it required conduct that, if engaged in solely by private parties, would violate section 1 of the Sherman Act. This count is not at issue on this appeal.

[6] The Wine & Spirit Wholesalers of Connecticut, Inc., a trade association of seven members who sell alcoholic beverages at wholesale in Connecticut, intervened as defendants and supported Connecticut's motion.

State Liquor Auth., 476 U.S. 573 (1986), unanimously reversed, holding that the Connecticut statute, even as amended, continued to control the prices at which brewers may sell beer in other States. After examining "the realities of beer price regulation in the border state area," *Healy II*, J.A. 196A, the court of appeals concluded that Connecticut's law "by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders," *id.* at 201A. The court held that this extraterritorial impact violated the Commerce Clause.

The court of appeals distinguished *Seagram* on the ground that *Seagram* did not "endorse regulation which had the effect of controlling wholesaler beer prices in other states." *Id.* at 200A. Moreover, the court noted that the precedential value of *Seagram* had been undermined by this Court's statement in *Brown-Forman* that it did " 'not necessarily attach constitutional significance to the difference between a prospective statute,' such as the one it struck down, 'and the retrospective statute at issue in *Seagram*.' " *Id.* at 200A-201A (quoting *Brown-Forman*, 476 U.S. at 584 n.6).

SUMMARY OF ARGUMENT

In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), this Court held New York's price affirmation law unconstitutional on its face. The Court applied established Commerce Clause principles to conclude that state laws linking prices for in-state sales to those charged out of state may be found unconstitutional *per se* for either of two reasons. Such laws are invalid if: (i) their "practical effect" is "to control . . . prices in other States" or (ii) as "simple economic protectionism" they require "that producers or consumers in other States surrender whatever competitive advantages they may possess." " 476 U.S. at 580, 583. The Connecticut beer price affirmation law — which was adopted for the purpose of increasing beer sales by local vendors at the expense of out-of-state vendors, by tying the maximum permissible price for an item of beer in Connecticut

to the minimum prices at which a brewer offers the same item in any of the bordering States — is invalid under *both* the extraterritorial regulation and economic protectionism doctrines.

First, as the court of appeals correctly ruled, the Connecticut law has an impermissible extraterritorial effect because it regulates prices in other States. Connecticut's requirment that, at the time of posting, the posted Connecticut price must be no higher than the lowest price charged for the same item anywhere in the bordering States inevitably impinges on the brewers' freedom to set their prices in other States based solely on the competitive and marketing conditions therein. Moreover, because of the purposeful interaction of Connecticut's law with those in bordering States appellants' argument that the brewers are free to change their out-of-state prices before and after the time of the posting is patently erroneous. *Brown-Forman* made clear that the determinative issue is whether the *practical effect* of the law is to regulate commerce in other States. 476 U.S. at 583; *see also Healy I*, 692 F.2d at 275. Since the interaction of Connecticut's law with the laws and regulations in other States deprives the brewers of the freedom to change their out-of-state prices, it is clear that the amended law still has the impermissible practical effect that *Brown-Forman* and *Healy I* held to violate the Commerce Clause.

Connecticut cannot escape the consequence of the interaction of its affirmation law with the regulatory schemes of the bordering States by arguing that the fault lies with the other States. This Court has consistently recognized that the interaction of a statute with the regulations applicable in neighboring States constitutes an overall practical effect that must be examined in assessing the statute's constitutionality under the Commerce Clause. *See, e.g., Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981). Moreover, it is only the Connecticut law that purposefully crosses state lines by referring to out-of-state prices as the benchmark for regulating beer prices for Connecticut.

Furthermore, although Connecticut claims that it has "done all that it can," Br. 9, to curb the extraterritorial impact of its laws by amending its statute, it is evident that any changes created by the amendments are merely cosmetic. If the amended law made a practical difference and actually allowed the brewers to change their bordering-state prices before or after the "moment" of affirming, the law would have no effect at all, and could not achieve the intended purpose of reducing the flow of Connecticut residents across state borders to buy beer at lower prices. Thus, as the court of appeals noted, the interaction of Connecticut's law with the laws in other States was "purposeful" and indeed central to achieving Connecticut's regulatory objective. J.A. 201A.

Second, the Connecticut law is protectionist. As appellants have conceded, and as the legislative history demonstrates, the law challenged herein was designed to halt the practice of Connecticut consumers living in border areas crossing state lines to purchase beer at lower prices. Even if the Connecticut statute only "equalized" beer prices on both sides of the state lines, this result still would have the tangible effect of depriving both vendors and consumers in the bordering States of the competitive advantages they would otherwise have relative to their Connecticut counterparts but for the Connecticut law. Under the Commerce Clause, a State may not seek to protect local interests by eliminating competitive advantages possessed by businesses or consumers in other States. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

Appellants have also erred in their reliance on *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), which upheld a retrospective price affirmation law. If, after *Brown-Forman*, anything is left of *Seagram* — a question this Court pointedly left open — what is left is plainly not enough to sustain the Connecticut law. This Court has consistently refused to extend *Seagram* to other types of affirmation statutes. *Brown-Forman*, 476 U.S. at 584 n.6; *Healy I*, 464 U.S. 909 (1983). The court of appeals was eminently correct

when it declined "to *extend* the *Seagram* precedent to validate [the] simultaneous affirmation provision" at issue here. J.A. 201A (emphasis in original). Moreover, unlike the Connecticut law, which was designed to favor in-state businesses, the law upheld in *Seagram* was enacted as a "drastic" requirement necessary to break "the grip of the liquor distillers on New York liquor prices." 384 U.S. at 48.

Furthermore, if this Court decides to reconsider *Seagram* in the context of the present case, *Seagram* should be overruled or substantially qualified. As Justice Blackmun observed in his concurring opinion in *Brown-Forman*, there is "no principled distinction . . . for constitutional analysis" between the retrospective affirmation law considered in *Seagram* and the prospective law struck down in *Brown-Forman*. 476 U.S. at 586. All price affirmation laws are protectionist and exercise impermissible extraterritorial control because they intrude considerations of the affirming State's market conditions into brewers' pricing decisions for other States, thereby neutralizing whatever advantages those States may possess.

Finally, the Twenty-first Amendment will not save protectionist or extraterritorial legislation. This Court has established that the Amendment provides no support for state laws that regulate prices in other States or constitute economic protectionism. *See Brown-Forman*, 476 U.S. at 584-85; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Healy I*, 464 U.S. 909 (1983). If the Twenty-first Amendment immunized extraterritorial legislation like the Connecticut law, a State could "interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment." *Brown-Forman*, 476 U.S. at 585. Moreover, as the Court emphasized in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 276 (1984), "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."

ARGUMENT

I. THE CONNECTICUT BEER PRICE AFFIRMATION LAW UNCONSTITUTIONALLY REGULATES COMMERCE IN OTHER STATES

The court of appeals correctly held that Connecticut's 1984 beer price affirmation law had the same practical effect as the prior version that was struck down in *Healy I* — the extraterritorial regulation of beer prices in the bordering States in violation of the Commerce Clause. Recognizing that the Connecticut law must be analyzed in light of the existing statutory and regulatory framework in the four-state region, the court held that the affirmation law "inevitably exercises control over 'the prices set for sales occurring wholly outside its territory.' " J.A. 196A (quoting *Healy I*, 692 F.2d at 282). Cosmetic changes in statutory language that alter neither the purpose nor the effects of the statute have not averted the law's continued conflict with basic Commerce Clause principles.

A. The Commerce Clause Prohibits Extraterritorial Regulation

It is well settled that the Commerce Clause prohibits extraterritorial regulation by any State of commerce in other States. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion); *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974) (per curiam); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935). The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. at 642-43.

Whether a state law impermissibly regulates commerce occurring outside the State depends, as Connecticut recognizes, Br. 13, on whether "the 'practical effect' of the law is to control . . . prices in other States." *Brown-Forman*, 476 U.S. at 583. Under the Commerce Clause, "the critical consideration is the overall effect of the statute on both local

and interstate activity." *Id.* at 579. As the court of appeals observed, this Court has consistently recognized that "the interaction of the statute with the regulatory schemes of neighboring states constitutes an 'overall effect' which appropriately is considered." J.A. 197A. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527-28 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 774-75 (1945).[7]

State laws violate the Commerce Clause when the enacting State has purposefully sought to interact with other States' regulatory schemes to achieve a purpose prohibited by the Commerce Clause. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 677 (striking down Iowa law restricting truck lengths when evidence showed that "Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic" to States with laws permitting longer truck lengths). Moreover, it is not a constitutional justification of a state law that its extraterritorial reach is a function of the statutory schemes of the other States to which it may extend. *See, e.g., New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1807-08, 1810 (1988) (declaring unconstitutional Ohio law denying generally available tax credit to sales of ethanol produced in other States unless those States' laws gave tax credit to sales of ethanol produced in Ohio); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957-58 & n.18 (1982)

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[7] Connecticut fails in its attempts to distinguish the above-cited cases on the ground that they involve transportation and that the regulation of transportation necessarily requires greater interstate uniformity and admits of less local control than does the regulation of alcohol distribution. Conn. Br. 14. There is no special Commerce Clause doctrine peculiar to state regulation of transportation. It simply is a fact that, because of the nature of transportation, such regulation often has the *practical effect* of regulating commercial activity outside the State. The test is the *practical effect* of the statute whether it regulates beer or trucks. In this case there is as much regulation of out-of-state commercial activity by Connecticut as there was by any of the States that have tried to reach out to control the equipment on trucks or the length of trains.

(declaring unconstitutional Nebraska law prohibiting export of groundwater to other States unless those States' laws permitted export of their groundwater to Nebraska); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 378-80 (1976) (declaring unconstitutional Mississippi law excluding milk from other States unless those States' laws permitted entry of Mississippi milk).

This Court has twice held that affirmation statutes that have the practical effect of controlling liquor prices in other States are prohibited by the Commerce Clause. In *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), the Court struck down a New York price affirmation statute that required distillers to post their wholesale liquor prices in New York on a monthly basis and to affirm that their wholesale prices in New York would be no higher than the lowest wholesale prices offered in any other State during the effective month. *Id.* at 575-76. The Court held that the New York statute effectively prevented distillers from lowering their prices in other States after posting and so imposed an impermissible extraterritorial restriction in violation of the Commerce Clause. The fact "[t]hat the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583. New York, the Court concluded, "has 'project[ed] its legislation' into other states, . . . directly regulated commerce therein," and deprived businesses and consumers in those States of "whatever competitive advantages they may possess." *Id.* at 580, 584.[8]

[8] The Court noted that the specific controversy that gave rise to the lawsuit involved (i) New York's refusal to permit distillers to offer promotional allowances that are permitted in other States and (ii) its defining "effective price" for purposes of price affirmation differently from other States. The Court observed that, as a result of the interaction of these laws, the New York law "can effectively force [the seller] to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes." 476 U.S. at 584.

In *Healy I* the court of appeals struck down Connecticut's original price affirmation statute, and this Court summarily affirmed the judgment. This statute, as we have seen, required brewers to post their Connecticut prices for the following month and file a sworn affirmation that these posted prices would be no higher than the lowest prices at which they would offer the same brands and packages of beer in any bordering State during the month covered by the posting. The court of appeals, in this Court's later paraphrase, concluded that "the Connecticut statute made it impossible for a brewer to lower its price in a bordering State in response to market conditions so long as it had a higher posted price in effect in Connecticut," and that, "[b]y so doing, the statute 'regulate[d] conduct occurring wholly outside the state,' 692 F.2d at 279, and thereby violated the Commerce Clause." *Brown-Forman*, 476 U.S. at 581-82.

Brown-Forman[9] and *Healy I* followed a long series of rulings by this Court establishing and confirming the proposition that States may not adopt laws that have the practical effect of regulating economic activity outside their borders. For example, in *Edgar v. MITE Corp.*, 457 U.S. at 642-43, in which the Court struck down an Illinois statute that regulated interstate corporate takeovers of non-Illinois corporations, Justice White noted that the Commerce Clause "precludes the

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[9] Following *Brown-Forman*, courts with only one exception have declared price affirmation statutes to be extraterritorial legislation in violation of the Commerce Clause. *See Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON (D. Del. Dec. 17, 1987) (declaring unconstitutional statute requiring price affirmation at time of sale); *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383 (D.N.M. 1987); *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Comm'n*, 643 F. Supp. 943 (D.S.C. 1986). The one exception, *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 860 F.2d 1354 (6th Cir. 1988), distinguished the court of appeals' decision in this case on the ground that the Connecticut statute inevitably controlled out-of-state prices: "there has been no claim that the Tennessee affirmation statute was designed to interact with the statutes of other states in such a way as inevitably to control prices beyond Tennessee's borders." *Id.* at 1361.

application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." In *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945), this Court struck down an Arizona law limiting the length of railroad trains because the "practical effect of such regulation is to control train operations beyond the boundaries" of Arizona.

Similarly, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court invalidated a New York law that banned the sale in New York of milk purchased outside of that State if the purchase price was below a minimum established by New York. The Court held that one State "has no power to project its legislation into . . . [another State] by regulating the price to be paid in that state for milk acquired there," *id.* at 521, or by attempting "to neutralize economic advantages belonging to" another State, *id.* at 528. Nor may a State adopt a law that has the practical effect of establishing "a scale of prices for use in other states." *Id. See also Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974) (per curiam), *aff'g* 365 F. Supp. 1144 (M.D. La. 1973), where the Court summarily affirmed a decision declaring unconstitutional a Louisiana statute which had the practical effect of regulating milk prices in other States by preventing milk purchased out-of-state from being sold in Louisiana when the purchase price was below a minimum set by Louisiana.[10]

These precedents clearly establish the unconstitutionality of Connecticut's affirmation law. The court of appeals correctly concluded that Connecticut's statute has the practical effect of regulating brewers' prices in the bordering States by tying the maximum permissible price for a brand and package

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[10] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), which the Wholesalers argue is a new departure in this Court's Commerce Clause jurisprudence, Br. 31-32, is entirely consistent with the precedents discussed above. In *CTS*, the Court upheld the validity of Indiana's takeover statute under the Commerce Clause precisely because it did not reach across state borders to regulate non-Indiana corporations. 481 U.S. at 93-94. By contrast, Connecticut's beer price affirmation law purposefully reaches across borders to control beer prices in neighboring States.

of beer in Connecticut to the minimum prices at which a brewer offers the same item anywhere in those other States. Moreover, it is obvious that controlling out-of-state prices is essential to Connecticut's acknowledged purpose for the law — "increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state" by stopping the flow of "Connecticut residents [who] have crossed state borders in significant numbers to purchase beer in other states at lower retail prices." Conn. Br. 6-7. Thus, as the court of appeals held, the extraterritorial restrictions imposed by Connecticut's beer price affirmation statute were "purposeful." J.A. 201A.

B. Connecticut's Extraterritorial Control of Beer in Other States Violates the Commerce Clause

There is no dispute about how the Connecticut statute interacts with the regulatory schemes of the bordering States in a manner which controls the pricing decisions of brewers in those States. The court of appeals analyzed three aspects of this interaction. J.A. 197A-200A.

First, Massachusetts law requires brewers to post their prices on the first day of each month to become effective on the first day of the following month. Once posted, these prices cannot be changed. Mass. Gen. Laws Ann. ch. 138, § 25B (West 1974). Therefore a brewer cannot simply change its Massachusetts price for the "moment" Connecticut alleges it takes to post prices in Connecticut on the sixth day of that following month. As discussed above, Connecticut's revised price affirmation law requires brewers to affirm on the sixth day of each month that the prices they will charge for the entire following month will be at least as low as the lowest price they are charging in any bordering State at the time of affirming. Therefore, when a brewer posts his February prices in Massachusetts on January 1, he must consider the prices he will be compelled to charge in Connecticut throughout the month of March. The Massachusetts price cannot be changed on February 7 after the affirmation required by Connecticut's

law; it remains in effect for the entire month of February. As the court of appeals concluded, "[a] brewer can therefore undertake competitive pricing based on the market realities of Massachusetts or Connecticut but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states." J.A. 198A.

Second, New York law requires that a promotional discount must be maintained for at least 180 days before prices can be raised. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). The court of appeals correctly found that the practical effect of the Connecticut law is to deter such discounts from being offered in New York markets because, if the discounted New York price is the lowest price in the three bordering States, it becomes automatically the regular price everywhere in Connecticut for the full 180 days plus an additional one month beyond the termination of the New York promotion, regardless of local competitive conditions in Connecticut. J.A. 199A.[11]

Third, volume discounts are permitted in Massachusetts, New York and Rhode Island, but are not allowed in Connecticut. The practical effect of Connecticut's price affirmation law is, therefore, to deter volume discounts anywhere in those States because, if volume discounts translated into the lowest per-container price in the neighboring States, the discounted price would have to be offered as the regular price for an entire month everywhere in Connecticut, where there is no reason to think that it would be warranted by costs or competitive conditions (especially as applied to non-volume sales). *Healy II*, J.A. 200A.

Plainly, the practical effect of Connecticut's price affirmation law is to exercise continuous extraterritorial control over brewers' future pricing decisions with respect to volume

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[11] Unlike Connecticut, which mandates a uniform state-wide price, New York law permits brewers to establish different prices based on conditions in different local markets. The Wholesalers' repeated unsupported assertions to the contrary, *see* Br. 35, 36; Jur. St. 20-21, are simply wrong. New York City wholesale prices are often the lowest in the four-state region. J.A. 151A.

discounts in Massachusetts, New York and Rhode Island, as well as brewers' future pricing decisions with respect to promotional discounts in New York. In the case of Massachusetts, Connecticut's law exercises an extraterritorial control over brewers' future pricing decisions with respect to all beer sales. Given the undisputed fact that different market conditions prevail in Connecticut and the bordering States, *see Healy II*, J.A. 192A; *Healy I*, 692 F.2d at 276 (noting that "[h]istorically the retail price of beer has been generally higher in Connecticut than in . . . Massachusetts, New York, and Rhode Island"), Connecticut's law must inevitably distort beer prices in those other States.[12]

The Connecticut price affirmation law prevents brewers from undertaking competitive pricing in the bordering States based solely on local market factors. When establishing their prices in the bordering States, the brewers are constrained by the prices they will be compelled to charge in Connecticut throughout the month following each affirmation. Connecticut therefore "has 'project[ed] its legislation' into other States, . . . directly regulated commerce therein," and deprived businesses and consumers in those States of "whatever competitive advantages they may possess" based on local market conditions, in contravention of established Commerce Clause principles. *Brown-Forman*, 476 U.S. at 580, 584.

Appellants argue that *Brown-Forman* and *Healy I* are distinguishable because in those cases the affirmation statutes at issue made price decreases in other States below the affirmed price illegal in the State of affirmation. By contrast,

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[12] *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 La. L. Rev. 649, 662 (1988), in which the authors conclude that:

> [P]rice affirmation regulations . . . lower price and raise consumption in the affirming state, but increase price and lower consumption in the nonaffirming state. The benefit to the consumers making lower priced purchases in the state having a price affirmation law not only causes losses to the distillers in both states, but also imposes additional costs on consumers in the nonaffirming state. That is precisely the phenomenon which is proscribed by the commerce clause.

appellants argue, the revised Connecticut price affirmation statute does not make price decreases in other States illegal. Conn. Br. 11-12; Wholesalers Br. 24-26. This argument misses the point because it ignores the plain language of *Brown-Forman*, *Healy I* and the other precedents discussed above. The Connecticut affirmation law violates the Commerce Clause "if the 'practical effect' of the law is to control liquor prices in other States." *Brown-Forman*, 476 U.S. at 583. Whether Connecticut's law achieves this effect by expressly declaring price decreases in the bordering States illegal (as the law did before it was revised), or by purposefully interacting with the bordering States' beer regulations to control price decreases in those States (as it does now), is irrelevant. It is the Connecticut statute's practical effect of extraterritorial control which is forbidden by the Commerce Clause.

Nevertheless, Connecticut contends that "[s]uch matters are clearly outside of [its] control." Conn. Br. 9, 13. It asserts that it "has done all it can to avoid the extraterritorial effects of its law." *Id.* at 9. The fault, according to Connecticut, lies with the laws of the bordering States. Connecticut also relies upon its belief that "administrative exemptions are available in both [New York and Massachusetts]." *Id.* at 13 n.5. This reasoning is specious.

A State law's violation of the Commerce Clause may not be justified by reference to the statutory schemes of other States. *See, e.g., New Energy Co. v. Limbach*, 108 S. Ct. at 1807-08, 1810; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 957-58 & n.18; *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. at 378-80. Significantly, it is only the Connecticut law — not the laws of any of the bordering States — which purposefully crosses state lines by making out-of-state prices the basis for regulating beer prices in Connecticut. If Connecticut did not persist in tying maximum in-state beer prices to the lowest beer prices in neighboring States, the price regulations in its neighboring States would not contribute to the undisputed extraterritorial effects. The source of these effects is clearly the Connecticut affirmation law, and Connecticut may not force the bordering States to change their

laws in order to eliminate the impermissible effects. *See Brown-Forman*, 476 U.S. at 584 (holding that New York may not through its affirmation law "force . . . other States to alter their own regulatory schemes").

Moreover, Connecticut is surely being disingenuous when it argues that it has done all it can to stop regulating beer prices in the bordering States by amending its statute. The 1984 amendments made a mere cosmetic change in the Connecticut law, which — even after the liquor commissioner's rewriting of the 1981 provision that the legislature had left unchanged — maintained the practical extraterritorial effects of the original law resulting from its interaction with bordering States' beer regulations. Connecticut has acknowledged that the purpose of its affirmation law is to stop its residents from crossing state lines "to purchase beer in other states at lower retail prices" by attempting to eliminate the lower retail prices prevailing in the border States. Conn. Br. 6-7, 10, 18. If the brewers were really free to change their prices in the bordering States after affirming in Connecticut — which they are not because of the interaction discussed above — Connecticut's beer price affirmation law would not and, indeed, could not have the effect intended by the State.

In apparent recognition of this fallacy in its argument, Connecticut argues that the brewers are free to seek regulatory exemptions from New York and Massachusetts to permit them to lower prices after the sixth of any month. Br. 13 n.5. But New York and Massachusstts are under no compulsion to grant the requests; there is nothing unconstitutional in their regulations. If, because of the concern about the consequences of the Connecticut provisions, New York and Massachusetts did grant across-the-board exemptions, thereby emasculating their own beer regulatory schemes, that would be proof of the extraterritorial effect of the Connecticut law, not mitigation of it. *See Brown-Forman*, 476 U.S. at 585. It is bizarre to suggest reliance on the grace of New York and Massachusetts authorities as the salvation of an unconstitutional Connecticut law. Even if Connecticut were offering some waiver machinery of its own — which it has not done —

"[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Id.* at 582 n.5.[13]

This Court should reject Connecticut's suggestion that it must close its eyes to the realities of the context in which the affirmation scheme was enacted and operates. The plain fact is that Connecticut's present price affirmation law has the same practical effects of severely restricting brewers' pricing flexibility in the bordering States that caused this Court to invalidate the State's prior price affirmation law. The law, therefore, impermissibly regulates extraterritorial conduct in violation of the Commerce Clause.

II. CONNECTICUT'S BEER PRICE AFFIRMATION LAW VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS PROTECTIONIST

The decisions of this Court have firmly established that state legislation constituting economic protectionism is invalid under the Commerce Clause. Connecticut's beer price affirmation statute constitutes such protectionism and accordingly should be declared unconstitutional. Appellants' arguments that Connecticut is merely trying to "equalize" prices on both sides of its borders and generate additional tax revenues are irrelevant.

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[13] Connecticut also argues that its affirmation law is constitutional because businesses that operate in a pervasively regulated industry in more than one State are often subject to inconsistent regulations "and any such business must simply be prepared to conform its various local operations to more than one set of laws." Br. 14. To support this assertion, Connecticut cites a number of cases that interpreted the Contract Clause, had nothing to do with extraterritorial legislation, and expressly stated that they did not involve the Commerce Clause. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 n.17 (1983); *Beer Co. v. Massachusetts*, 97 U.S 25, 33-34 (1877). These cases do not support the assertion that a brewer may lawfully be compelled to conform its local operations in one State to the laws of another State because of the purposeful extraterritorial effect of that State's beer regulations. Practical extraterritorial control over local operations in another State is precisely what this Court condemned in *Brown-Forman*. 476 U.S. at 583-84.

A. The Constitution Prohibits Legislation That Benefits Local Residents at the Expense of Out-of-State Residents

As this Court recently reiterated in *Brown-Forman*, when a state statute "discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." 476 U.S. at 579.[14] In such circumstances, "a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-39 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). "[T]he Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis*, 447 U.S. at 44. *Accord Hood*, 336 U.S. at 538 (noting "the incapacity of the state to protect its own inhabitants from competition").

Attempts by States to protect themselves from outside competition, even if such attempts are only intended to achieve price equality, constitute "economic protectionism" and are *per se* illegal under the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351-52 (1977). As this Court held in *Brown-Forman*, a State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." 476 U.S. at 580. *See also New Energy Co. v. Limbach*, 108 S. Ct. 1803, 1807-08 (1988); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948).

In the leading Supreme Court case on economic protectionism, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), on which the Court heavily relied in *Brown-Forman*, New

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[14] Protectionism, of course, is not limited to efforts to benefit local businesses at the expense of their out-of-state counterparts; it also includes efforts to benefit local consumers. *See Brown-Forman*, 476 U.S. at 580; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982).

York required that milk distributors pay a minimum price for all milk that they intended to sell in New York, including milk purchased out-of-state. Because Vermont dairy farmers produced milk at lower cost than New York dairy farmers, the effect of the statute was to eliminate the competitive economic advantage enjoyed by Vermont dairy farmers by equalizing the price of milk from all sources.

The Court held that the minimum price floor for milk amounted to impermissible economic protectionism:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

Id. at 522. In effect, New York had imposed an import tariff on all milk brought into the State. *Id.* at 521. Such a tariff, the Court concluded, violated the Commerce Clause. *Id.* at 522. *See also Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1154 (M.D. La. 1973) (a State may not, to protect its inhabitants, "neutralize an economic advantage possessed by a neighboring state by imposing its minimum price standards on the products purchased in that neighboring state"), *aff'd*, 416 U.S. 922 (1974).

In *Seelig*, there was no avowed intent to hurt or discriminate against out-of-state businesses, merely a desire to benefit economically local businesses — the equivalent of what the district court in *Healy I* called "cushioning the impact of free competition on the small retail stores." 532 F. Supp. at 1318 n.16 (D. Conn. 1982). Moreover, as in this case, the statute involved in *Seelig* merely required "equal" prices for out-of-state products. Yet, that statute, like the Connecticut price affirmation provisions, by stripping out-of-state producers of their competitively set lower prices for the purpose of economically benefiting in-state businesses and residents, "set a barrier to traffic between one state and another" and therefore violated the Commerce Clause. *Seelig*, 294 U.S. at

521. *See also Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977), holding that a State discriminates against interstate commerce when a "statute has the effect of stripping away" from out-of-state businesses "the competitive and economic advantages" they have earned for themselves, or when the statute has a "leveling effect which insidiously operates to the advantage of local" businesses.[15]

B. The Connecticut Affirmation Provisions are Protectionist

The Connecticut affirmation provisions constitute a paradigm case of an explicitly protectionist statute. By its very terms, the law strips New York, Massachusetts and Rhode Island retailers, wholesalers, consumers and brewers of all competitive advantages that they previously enjoyed. Such legislation, at the very least, "invokes the strictest scrutiny." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *New Energy Co. v. Limbach*, 108 S. Ct. at 1810. No more than a brief examination is required to confirm the protectionist nature of the Connecticut statute.

Equalizing prices at the wholesale level between Connecticut and its neighbors destroys the competitive advantage of businesses in neighboring States relative to Connecticut businesses. *See Brown-Forman*, 476 U.S. at 580; *Seelig*, 294 U.S. at 522. Retailers and wholesalers in neighboring States will lose business from Connecticut customers regardless of whether the prices they pay are increased to the level of their

[15] Indeed, in one respect this case represents a far more drastic interference with interstate commerce than the pricing requirement in *Seelig*. In *Seelig*, New York sought only to strip out-of-state milk producers of their lower prices when they sold to New York distributors. The Connecticut statute not only strips out-of-state beer retailers of their competitive advantage of lower prices when they sell to Connecticut residents but also will inevitably raise beer prices for the residents of New York, Massachusetts and Rhode Island who purchase beer for consumption in their home State. *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 La. L. Rev. 649 (1988).

Connecticut competitors or the Connecticut competitors' prices are reduced to their levels. *Cf. Healy I*, 532 F. Supp. at 1317. The incentive to purchase beer out-of-state is eliminated and the widespread shopping of Connecticut residents for beer in the neighboring States will cease. Similarly, the comparative advantage of consumers in bordering States relative to consumers in Connecticut is also eliminated. *See Brown-Forman*, 476 U.S. at 580. Moreover, bordering-state wholesalers, retailers and consumers will lose the advantage of the prices created by economic conditions. *See Seelig*, 294 U.S. at 524. The impact of the Connecticut statute is identical to that of a tariff.

The legislative debates concerning the adoption of the Connecticut price affirmation statute confirm that the purpose of the legislators supporting the law was to protect Connecticut businesses from out-of-state competition. The Connecticut legislature enacted beer price affirmation in response to the widespread discontent of retailers with out-of-state competition. The legislature believed that beer was cheaper in the neighboring States of New York, Massachusetts and Rhode Island because of Connecticut's minimum price regulations, and that many people traveled to those States to buy the cheaper beer. The legislature responded to the discontent in part by repealing the minimum markup for beer. 1981 Conn. Pub. Acts No. 81-294, § 21 (Reg. Sess.) (effective date Jan. 1, 1982).

The Connecticut legislature, however, went on to impose beer price affirmation in order to protect its local businessmen from the robust competition occurring outside its borders. The protectionist purpose of the legislation was stated clearly by Senator Schneller, a proponent of the legislation:

> What we're saying is Mr. Beer distributor or Mr. Beer brewer, you're going to have to send your beer into the State of Connecticut at the price that is the lowest price at which you sell to any distributor in Rhode Island, Massachusetts or New York. *We are not taking off minimum markup and making a totally competitive free enterprise*

> *situation. I think we're doing it in a way that provides a measure of protection to the individuals that the State of Connecticut had made a contract with.*

Conn. General Assembly Proceedings 1981: Senate 45-46 (emphasis added).[16] Similar sentiments were expressed by other proponents of the bill, both in the Senate and in the House of Representatives. *See id.* at 23 (remarks of Senator Mustone) (describing losses of revenue to local retail businesses of between $40 million and $50 million per year); *id.* at 58 (remarks of Senator O'Leary) ("liquor store owners in my district are starving to death slowly as result of business fleeing to Massachusetts"); *Conn. General Assembly Proceedings 1981: House of Representatives* 118 (remarks of Representative Schlesinger) (opposing amendment to eliminate price affirmation because amendment not in spirit of "discourag[ing] out of state purchases").

Indeed, the district court in *Healy I* found as an undisputed fact that the purpose of the legislation was to increase beer purchases within Connecticut, with the increases resulting from the shifting of purchases previously made outside of Connecticut to retailers located in Connecticut. 532 F. Supp. at 1316-17; *see also Healy I*, 692 F.2d at 276.

The legislative purpose behind the subsequent amendments to the price affirmation statute, although purportedly an attempt to comply with *Healy I*, remained the same — the protection of local beer retailers and wholesalers from out-of-state competition.[17] Representative Moynihan succinctly stated the legislature's view of the purpose behind beer price affirmation:

> We decided to open up competition among our retailers and among our wholesalers so they were no longer protected by minimum markup. What we are concerned

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[16] Excerpts from the legislative debates are reproduced in the Joint Appendix, J.A. 45A-85A. The entire debates are contained in the Record on Appeal filed in the court of appeals in connection with *Healy II*. Citations are to the Joint Appendix whenever cited material is included therein.

[17] *See supra* p. 7 n.4.

> [sic] is the leverage of the State stores had [sic] in purchasing and the border states, the very large states, and the enormous size of the wholesalers and retailers, that our wholesalers and retailers would be at a disadvantage because so many of our customers had gotten in the habit of going across the border.

J.A. 57A. Representative Zajac, another proponent of the 1984 amendments, confirmed the legislature's protectionist purpose when he stated that "affirmation, in fact, is working" because fewer Connecticut residents were purchasing their beer in the neighboring States. J.A. 66A.

It is thus apparent that the Connecticut legislature intended to achieve the very protectionist goals which are inherent in the statutory provisions and are the inevitable effect of the statute's operation.

Appellants argue, however, that somehow this elimination of competition does not amount to protectionism. They claim it is significant that Connecticut is merely seeking "equal prices" for its wholesalers, not lower prices. But this is frivolous. Requiring price equality is as protectionist as requiring a price advantage.

In *Brown-Forman*, New York sought only "equality" in liquor pricing rather than a price advantage for its wholesalers *vis à vis* wholesalers in other States. In *Seelig*, New York did not require that Vermont milk producers charge more for their milk than New York producers but sought only to equalize the prices paid for milk purchased by New York distributors in Vermont and New York. Similarly, in *Hunt* the North Carolina authorities sought only to place all apple producers, both in-state and out-of-state, on an "equal" footing with respect to apple sales within the State. Nevertheless, the Supreme Court in all these cases invalidated the state legislation as *per se* unconstitutional. *See also Limbach*, 108 S. Ct. at 1805 (State may not condition tax created for sale of out-of-state ethanol upon reciprocity); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (State may not condition sale of out-of-state milk upon reciprocity).

The Commerce Clause was adopted to foster the unfettered competition of products and prices in interstate commerce. Connecticut's attempt to impose price uniformity on interstate commerce is as obnoxious to the Commerce Clause as an attempt to gain an economic advantage over out-of-state residents.

Moreover, the Connecticut price affirmation statute does not merely equalize prices among competing businesses along state borders. The Connecticut statute ties Connecticut prices to the lowest prices anywhere in any neighboring State, not merely in the areas bordering the particular Connecticut market. For example, if prices for a brand in New York City were lower than prices in any of the other States adjoining Connecticut,[18] wholesalers in areas of Connecticut that border Massachusetts would nevertheless receive beer at prices equal to New York City prices. These prices could be substantially lower than competitive prices in Massachusetts (or even areas of New York State) near the Connecticut border.

Appellants attempt to divert attention from these basic principles by claiming that Connecticut has a right to prevent brewers from discriminating against Connecticut wholesalers by charging them higher prices than border-state wholesalers.[19] It is readily apparent, however, that what appellants are complaining about is only that individual brewers charge whatever prices they believe will maximize their profits in particular markets. The Commerce Clause simply does not permit Connecticut to deprive brewers of this right beyond its borders. Appellants apparently envision a regime in which the States are free to compel brewers to charge uniform prices

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[18] *See* J.A. 151A.

[19] Appellants, of course, ignore the fact, which they have conceded, that "prices charged by brewers and importers to Connecticut wholesalers are neither the highest nor the lowest in the four-state area." J.A. 152A. Moreover, as the district court noted in *Healy I*, it is Connecticut's "extensive regulations" that result in "maintaining higher prices and otherwise restricting price competition" in that State. 532 F. Supp. at 1318 n.16.

throughout the nation, thereby depriving out-of-state residents of the advantages of lower prices. This is precisely what the Commerce Clause prohibits. *See, e.g., Limbach*, 108 S. Ct. at 1807-08; *Brown-Forman*, 476 U.S. at 580; *Hunt*, 432 U.S. at 351-52.

Appellants urge alternatively that Connecticut's attempt to deter Connecticut residents from purchasing beer out-of-state should be sustained because the legislature's ultimate purpose was to increase tax revenues by increasing the purchase of beer by Connecticut residents within the State. The statutory provisions and legislative debates, discussed above, reveal that the legislative purpose was not to increase tax revenues but to benefit Connecticut wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers.[20] It is unnecessary, however, to resolve the dispute about "*ultimate* legislative purpose," because "its resolution would not be relevant to the constitutional issue to be decided in this case." *City of Philadelphia v. New Jersey*, 437 U.S. at 626 (emphasis added). This Court has emphasized that "[t]he evil of protectionism can reside in legislative means as well as legislative ends." *Id.* A State may not pursue legitimate health, safety or economic goals by requiring out-of-state producers or consumers to surrender economic advantages they possess. *See Brown-Forman*, 476 U.S. at 580; *Bacchus*, 468 U.S. at 270-73; *Hood*, 336 U.S. at 538; *Seelig*, 294 U.S. at 523. As the Court held in *Toomer v. Witsell*, 334 U.S. at 406, "the importance of having commerce between the . . . States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax."

Connecticut's reliance upon its interest in increasing tax revenues is particularly specious. Acceptance of this proposition would eviscerate the protections of the Commerce

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[20] It is readily apparent that increasing tax revenues "is merely an occasional and accidental effect of achieving what is its purpose, favorable . . . treatment for" Connecticut wholesalers and retailers at the expense of their out-of-state counterparts. *Limbach*, 108 S. Ct. at 1806.

Clause. Virtually any state regulation designed to increase in-state sales at the expense of out-of-state sales in order to benefit local merchants will, if it succeeds in increasing in-state sales, also increase tax revenues. Thus, a State could almost always characterize protectionist legislation as a means of increasing tax revenue. In any event, Connecticut's alleged interest in increasing tax revenues may not be achieved by the "illegitimate means of isolating the State from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. at 627.

Finally, Connecticut conjectures, without any support in the record whatsoever, that the affirmation provisions may prevent violations of limitations upon importation imposed by Connecticut law. Br. 10, 19, 23 & n.11. Nowhere does Connecticut explain why it believes Connecticut residents who purchase beer from bordering-state retailers are violating these limitations. Moreover, the statute Connecticut cites, Conn. Gen. Stat. § 12-436 (West Supp. 1988), states that "[t]he provisions of this section shall not apply to alcoholic beverages which are actually brought into the state by any individual in quantities of four gallons or less." In view of this exception, Connecticut's speculation that its beer price affirmation law is intended to prevent evasion of import limitations by consumers is implausible. In any event, even if greater enforcement of importation restrictions is desirable, it may not be achieved through means designed to deprive bordering-state consumers, retailers and wholesalers of whatever competitive advantages they enjoy. The Wholesalers engage in additional speculation that the Connecticut statute may promote highway safety. Br. 34. There is no claim in this case, however, that Connecticut border residents regularly cross state lines to consume beer as opposed to buying it at retail establishments for home consumption. Similarly, there is no claim that Connecticut border residents would drive any

less frequently to purchase beer in Connecticut rather than in the border areas of neighboring States.[21]

It is Connecticut's burden, where, as here, the legislation discriminates against interstate commerce, to show at least that the affirmation scheme serves a legitimate local purpose that could not be served as well by non-discriminatory means. *Limbach, supra; Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (plurality opinion). The various rationales proffered by appellants are wholly inadequate.[22]

III. APPELLANTS' RELIANCE UPON *SEAGRAM* IS ERRONEOUS

Appellants claim that Connecticut's extraterritorial and protectionist legislation is somehow saved by this Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). If, after *Brown-Forman*, anything is left of

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[21] Significantly, a review of the relevant legislative debates reveals that not one legislator mentioned enforcement of importation restrictions or highway safety as reasons for enacting affirmation legislation. *See* J.A. 45A-85A (containing excerpts from legislative debates); Record on Appeal.

[22] Connecticut also argues, Br. 19 & n.10, that the brewers do not have standing to challenge the beer price affirmation laws as protectionist. To have standing, a plaintiff need show "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978). Thus, the plaintiff must show a " 'distinct and palpable injury' " to himself and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power*, 438 U.S. at 72 (citations omitted). As the district court found, the beer price affirmation provisions regulate the brewers' pricing decisions and restrict to some degree their pricing flexibility. J.A. 183A-184A. Thus, there is sufficient injury and causal connection to give the brewers standing to challenge the law. Moreover, as long as the brewers are injured themselves, they are "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [their] constitutional challenge fail and the statutes remain in force." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Consequently, the brewers may also assert the burdens imposed by the price affirmation provision on wholesalers, retailers and consumers in the bordering States.

Seagram— a question this Court pointedly left open — what is left is plainly not enough to sustain the Connecticut beer price affirmation law. Unlike the old New York liquor price affirmation statute upheld in *Seagram*, the Connecticut statute is not "retrospective" in nature. Connecticut's revised affirmation law is "contemporaneous" or "simultaneous," not retrospective, because it ties Connecticut prices to the lowest prices being offered in a bordering State at the time of affirmation. *See Healy II*, J.A. 195A, 201A. Therefore, like the new New York statute at issue in *Brown-Forman*, Connecticut's law is not validated by *Seagram*. *See Brown-Forman*, 476 U.S. at 584 n.6. This Court has consistently declined to extend *Seagram* to uphold other types of affirmation statutes. Connecticut's original beer price affirmation law fell in *Healy I* and New York's new liquor price law fell in *Brown-Forman* in spite of *Seagram*. The Court should also decline to extend *Seagram* in this case.

Furthermore, *Seagram* was decided in a unique context in which no affirmation statute had yet been put into effect. 384 U.S. at 42-43. At that time, "affirmation statutes were comparatively new," *Brown-Forman*, 476 U.S. at 586 (Blackmun, J., concurring), and their practical effects could not be foreseen. The Court noted in *Seagram* that "it is possible that specific future applications of [the retrospective statute] may engender concrete problems of constitutional dimension," which it would deal with as they arose. 384 U.S. at 52. Here, as demonstrated above, the practical effects of the Connecticut statute's interaction with the beer regulations of Massachusetts, New York and Rhode Island are clear and indistinguishable from the practical effects of the statutes struck down in *Brown-Forman* and *Healy I*.

Moreover, the liquor price affirmation statute before the *Seagram* Court was passed by New York in order to break the monopolistic and discriminatory grip of liquor distillers on the New York market, not to gain an economic advantage for New York residents. Indeed, the Court noted that "only by imposing the relatively drastic 'no higher than the lowest price' requirement . . . could the grip of the liquor distillers on

New York liquor prices be loosened." 384 U.S. at 48. Significantly, no claim of economic protectionism was even asserted in *Seagram* by the plaintiff.

The Connecticut statute, in contrast, seeks only to promote in-state sales at the expense of out-of-state sellers and consumers. There is no basis for asserting that Connecticut consumers, retailers or wholesalers are the victims of illegal or anti-competitive conduct.[23] Thus appellants err in construing *Seagram* — particularly in view of intervening Supreme Court decisions culminating in *Brown-Forman* — as giving permission to States to enact protectionist or extraterritorial legislation. The court of appeals correctly concluded that it would

> decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

J.A. 201A (emphasis in original).

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[23] Appellants seem to claim that prices are higher in Connecticut than in New York border areas because of the highly regulated and anti-competitive nature of the New York liquor industry. Conn. Br. 19-20, Wholesalers Br. 32-34. This is both irrelevant and erroneous. Appellants have pointed to no New York statute or regulation relating to the sale of beer that in any way reaches beyond New York's borders. Moreover, as appellants have conceded, "the brewers' pricing policies in New York and Rhode Island are characterized by a good deal of flexibility and variability. The New York City market is the most highly competitive, and accordingly, prices are often the lowest in the four-state region." J.A. 151A. The claim by the Wholesalers that New York prices near the border are lower because such areas by operation of New York law receive the benefit of low New York City prices is also erroneous. Unlike Connecticut, New York does not require brewers to charge uniform prices throughout the State and permits brewers to charge different prices in different regions. Indeed, it is the Connecticut scheme that will result in discrimination at the border since the Connecticut border wholesalers and retailers will receive the lowest prices available anywhere in New York even though the wholesalers and retailers just across the Connecticut border in New York may be receiving higher prices.

If this Court determines to reach the question of the continuing validity of *Seagram* in the context of this case, it should be overruled or substantially qualified. Its precedential value has been significantly undermined by *Brown-Forman*, which in discussing *Seagram's* inapplicability to the New York affirmation law before it, noted that

> we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case.

476 U.S. at 584 n.6. Justice Blackmun, concurring, urged that *Seagram* be formally overruled as "a relic of the past" and concluded that "no principled distinction" could be drawn "for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram*." 476 U.S. at 586. Like all affirmation laws, a retrospective statute — which ties maximum future prices in one State to the lowest prices in other States as determined at a specified time in the past — will control brewers' future pricing decisions in the nonaffirming States. Brewers will not forget that the lowest prices which they set in the nonaffirming States will one day become the maximum permissible prices in the States requiring affirmation.[24]

Formalistic distinctions among types of affirmation laws obscure a basic truth: All price affirmation laws are protectionist and exercise impermissible extraterritorial control by

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[24] *See Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383, 1386 (D.N.M. 1987):

> Whether the extraterritorial effect of price affirmation legislation is directed to the past, to the future or to the instant of posting prices is of no constitutional consequence. "It is not the timing of the extraterritorial effect but the fact that it takes place which the Supreme Court has declared invalid."

(Citation omitted). *See also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause") (emphasis in original).

intruding considerations of the affirming State's market conditions into brewers' pricing decisions for other States. Legislation that requires manufacturers or retailers to offer their products for sale at prices no higher than the prices offered in other States inevitably regulates pricing decisions in other States and deprives out-of-state consumers of the relative advantage they would enjoy in the absence of such legislation. A State is normally free to fix the maximum price at which beer may be sold within its borders. It may not do this, however, in a manner that inevitably imposes burdens upon consumers in other States in order to achieve lower prices within its borders. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). This is precisely what affirmation statutes do.[25]

In determining whether a statute violates the Commerce Clause, "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. at 37. Under affirmation, a brewer is no longer free to set prices in out-of-state markets in a manner that will maximize profits in those markets based upon prevailing market conditions. It must consider that the lowest prices it charges in those markets must be offered throughout the affirmation State. If an affirmation State's prices are higher than those offered in out-of-state markets in the absence of affirmation, a brewer's interest in profit maximization will inevitably result in his raising his out-of-state prices and lowering his affirmation-state prices to some extent in order to satisfy the requirements of affirmation. This is the very evil condemned by this Court in *Seelig*. "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. Affirmation statutes inevitably deprive other States of economic advantages created by market forces in order to obtain lower prices for in-state consumers. This is

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[25] *See* Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws*, 48 La. L. Rev. at 662, 667, 669, 672, 673-74.

precisely the protectionist effect that was condemned in *Seelig* and *Hunt*.

Recent economic scholarship confirms that

> both [prospective and retrospective] types of price affirmation burden interstate commerce because they both cause firms to consider jointly their demand and marginal cost curves in more than one state. Accordingly, the impact of an affirmation law adopted by one state will be transmitted to other states, affecting prices charged in those other states in the process. This impact on interstate commerce is inherent in any law that ties prices in one state to prices in other states.[26]

Moreover, if the constitutionality of beer affirmation statutes is sustained, other States would no doubt retaliate or seek similar benefits by enacting similar statutes.[27] *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). The result would be uniform national beer prices imposed by the States. But this is the type of interference with and control of the nationwide economic free market which the Commerce Clause precludes the States from undertaking and preserves for the consideration of Congress. *Cf.* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1187-91 (1986).[28]

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[26] Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws*, 48 La. L. Rev. at 673-74. As the authors explain, "both types of affirmation cause prices to be lower in the affirming states and higher in those nonaffirming states used in the joint determination process than prices would be in the absence of affirmation. As such, both types of affirmation burden interstate commerce." *Id.* at 672.

[27] Indeed, the proliferation of such statutes has already considerably restricted pricing flexibility in the liquor industry. *See Brown-Forman*, 476 U.S. at 586 (Blackmun, J., concurring).

[28] Connecticut argues that it should be allowed to discriminate through its affirmation law because "control states" acting as market participants are able to require price-affirmation clauses in their contracts to purchase liquor. Conn. Br. 24. Connecticut's argument turns the market participant doctrine on its head by eliminating the distinction between "a State's acting

Finally, the rationale of *Seagram*, which relied principally upon the Twenty-first Amendment, has been substantially eroded by developments in this Court's Twenty-first Amendment jurisprudence, *see* Point IV *infra*, which establish that the Amendment does not authorize States to enact protectionist or extraterritorial legislation that would otherwise violate the Commerce Clause.

IV. THE TWENTY-FIRST AMENDMENT DOES NOT PROTECT EXTRATERRITORIAL OR PROTECTIONIST LEGISLATION

Appellants repeat the same proposition already rejected by this Court in *Brown-Forman*, 476 U.S. at 584-85, and *Healy I*, that an extraterritorial price affirmation statute is somehow excused by the Twenty-first Amendment. As the court of appeals correctly held, this Amendment reserves to the States the power to regulate the " '*transportation* or *importation*' of liquor '*into*' any [s]tate . . . for delivery or use *therein*,' " but does not give any State the power to control the price of liquor in other States. J.A. 202A (emphasis in original). This Court has consistently rejected the argument "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). Instead, both the Commerce Clause and the Twenty-first Amendment are parts of the same Constitution, *id.* at 332, and they must be reconciled in any particular case according to the different purposes they serve and different interests they protect. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-52 (1987);

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in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant." *New Energy Co. v. Limbach*, 108 S. Ct. at 1809. Connecticut is not a market participant in this case because its sovereign act of enacting the beer price affirmation law "cannot plausibly be analogized to the activity of a private purchaser." *Id.* Therefore, Connecticut's beer price affirmation law is subject to the requirements of the Commerce Clause and cannot be validated by the actions of control States.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109-14 (1980).

If Connecticut were correct that the Twenty-first Amendment protects its extraterritorial price affirmation law from challenge under the Commerce Clause, then Connecticut's exercise of its rights under this Amendment "may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment" by "forc[ing] other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in" Connecticut. *Brown-Forman*, 476 U.S. at 585. Such interference could serve only to invite retaliatory legislation from other States — one of the evils which the Commerce Clause was intended to prevent. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

Moreover, the Twenty-first Amendment does not immunize protectionist legislation from invalidation under the Commerce Clause. Thus, in *Bacchus* the Court rejected the contention that the Twenty-first Amendment authorized a state tax that discriminated against out-of-state alcoholic beverages in violation of the Commerce Clause:

> One thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Id. Because the only justification for the discriminatory tax was to promote local industry, *Bacchus* rejected the State's Twenty-first Amendment argument. Here, as in *Bacchus*, Connecticut has not attempted to justify its legislation on the basis of a purpose to reduce beer consumption or combat any perceived evil attending the consumption of beer. Instead, the Connecticut affirmation statute, as appellants proclaim, is designed to increase Connecticut beer sales by depriving

out-of-state businesses and consumers of competitive advantages which they presently enjoy. Consequently, the Twenty-first Amendment has no bearing on the constitutionality of the Connecticut statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY I. GLEKEL
Counsel of Record,
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Appellee Anheuser-Busch, Inc.

Of Counsel
Timothy G. Reynolds
Janet E. Schomer

GARY NATEMAN, ESQ.
The Beer Institute
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337

Attorney for Appellee The Beer Institute

JEROME I. CHAPMAN
Counsel of Record,
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Appellee Miller Brewing Company

Of Counsel
Wayne C. Holcombe

WILLIAM H. ALLEN
Counsel of Record,
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Appellees The Beer Institute, G. Heileman Brewing Company, The Genessee Brewing Company, Inc., All Brand Importers, Inc., Dribeck Importers, Inc., Guiness-Harp Corp., Labatt Importers Inc., Martlett Importing Company, Inc., Monterey Bay Company, Inc., and *Van Munching and Company, Inc.*